STATE OF MICHIGAN
IN THE SUPREME COURT

DEAN ALTOBELLI,

Plaintiff/Appellee/Cross-Appellant,

v

MICHAEL W. HARTMANN, MICHAEL P. COAKLEY, ANNA M. MAIURI, JOSEPH M. FAZIO, DOUGLAS M. KILBOURNE, JOHN D. LESLIE, AND JEROME R. WATSON,

Defendants/Appellants/Cross-Appellees.

Supreme Court No. 150656

Court of Appeals No. 313470
(Judges Borrello, Servitto and Beckering)

Lower Court No. 12-635-CZ
Ingham County Circuit Court
Hon. Paula Manderfield

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DEFENDANTS/APPELLANTS/CROSS-APPELLEES' SUPPLEMENTAL BRIEF ON ARBITRABILITY

Cases

Other Authorities

I. INTRODUCTION

It is well-established that "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract," and that these traditional principles are applicable to arbitration agreements. *Arthur Andersen LLP v Carlisle*, 556 US 624, 631 (2009); *Arnold v Arnold Corp*, 920 F2d 1269, 1281 (CA6, 1990) (recognizing that courts "have held consistently that nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles.") On November 13, 2015, the Court ordered the parties to file supplemental briefs addressing whether this lawsuit – which was directed at the Miller Canfield firm's principals rather than the Firm itself – implicates the Firm Operating Agreement's mandatory arbitration provision under two of those traditional principles: "agency" and "equitable estoppel." The answer is yes, under either principle.

The agency theory recognizes that because a corporation acts only through its employees, individual employees sued for acts undertaken in the course of their employment enjoy the benefits of the corporation's contracts. The estoppel theory provides that a party suing for relief related to alleged breaches of a contract cannot disavow other portions of the same contract to his opponent's detriment. Courts nationwide routinely apply agency principles to give a firm's managers the benefit of their company's arbitration agreements, and apply estoppel principles to allow defendants sued for contract-related decisions to invoke the contract's arbitration clause. *See Arnold*, 920 F2d at 1281-82 (citing authorities); *Javitch v First Union Sec, Inc*, 315 F3d 619, 628-29 (CA6, 2003) (same); *cf. AFSCME Council 25 v Wayne Cty*, 292 Mich App 68, 81-82; 811 NW2d 4, 12 (2011) (recognizing that "ordinary contract-related legal principles" such as "agency" and "estoppel" may bind party to arbitrate a dispute). Michigan recognizes both traditional principles, and they apply in the arbitration context as well.

Here, Altobelli's allegations, although wrapped in the mantle of tort law, are quintessentially claims that Appellants violated the Miller Canfield Operating Agreement: Altobelli says that Appellants underpaid him, that they did not let him take a leave of absence to coach football, and that when he left nonetheless, they treated his departure as a resignation. Appellants are agents of Miller Canfield—specifically, the Firm's CEO, a majority of its Managing Directors, and the head of the Litigation Practice Group—sued for making the Firm's business decisions that Altobelli now disputes. They are thus entitled to rely on the arbitration clause as agents of Miller Canfield. Likewise, because Altobelli is suing for what amounts to violations of the Operating Agreement, he is estopped from arguing that the arbitration clause of the Operating Agreement does not apply here.

II. ARGUMENT

A. The Individual Defendants are Entitled to the Benefit of the Arbitration Agreement Because They Were Acting As Agents of Miller Canfield.

"[A] corporate entity or other business can only operate through its employees and an arbitration agreement would be a meaningless arrangement if its terms did not extend to them." *Grand Wireless, Inc v Verizon Wireless, Inc*, 748 F3d 1, 9-11 (CA1, 2014). It is thus a "well-settled principle" that, consistent with traditional concepts of state law, "agents [are afforded] the benefits of arbitration agreements made by their principal." *Arnold*, 920 F2d at 1282; *see also, e.g.*, *Grand Wireless*, 748 F3d at 11; *Roby v Corp of Lloyd's*, 996 F2d 1353, 1360 (CA2, 1993); *Pritzker v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 7 F3d 1110, 1121-22 (CA3, 1993); *Belom v Nat'l Futures Ass'n*, 284 F3d 795, 799 (CA7, 2002); *Nesslage v York Secs, Inc*, 823 F2d 231, 233-34 (CA8, 1987); *Letizia v Prudential Bache Secs, Inc*, 802 F2d 1185, 1187-88 (CA9, 1986); 1 Domke on Commercial Arbitration § 13:3 ("the courts have consistently afforded agents the benefit of arbitration agreements entered into by their principals"); *Arthur Andersen LLP*, 556

US 624, 631 (holding that federal courts must turn to state law principles to determine who is bound by a contractual arbitration clause).

For example, in *Arnold*, a corporate entity's agents sought coverage under the principal's arbitration agreement, despite the fact that the agents were not signatories, or even mentioned in the arbitration clause. *Id.* at 1281-82. The Sixth Circuit held that the agents were covered by the arbitration agreement, because if the plaintiff could "avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as [defendants] in his complaint, or signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified." *Id.* (internal quotation marks omitted). The court rejected the plaintiff's argument that the agents were acting outside the scope of their corporate authority, as the alleged wrongdoing "related to their running of the corporation." *Id.* at 1282.

There is no question that Michigan law recognizes the same traditional "agency" principle underlying the cases cited above. After all, the proposition that "an employee cannot be liable for acts attributable to his employer when he is working in his capacity as an employee" is "well settled in Michigan." *Experts, LLC v JPMorgan Chase & Co*, No. 13-CV-12550, 2013 WL 4487508, at *3 (ED Mich Aug 20, 2013) (Appx. 1) (citing *Huizenga v Withey Sheppard Assoc*, 15 Mich App 628, 633; 167 NW2d 120 (1969)). Indeed, earlier panels of the Court of Appeals have applied the agency principle to enforce arbitration agreements without controversy in unpublished opinions,[1] and that Court has recognized the same principle (without needing to

[1] *Cullen v Klein*, No. 291810, 2010 WL 3666758, at *5 (Mich Ct App Sept 21, 2010) (citing *Arnold* in rejecting "plaintiff's contention that because defendants signed the employment and stock purchase agreements as employees of MPSA, they cannot enforce arbitration of a claim made against them as individuals"); *Beaver v Cosmetic Dermatology & Vein Centers of Downriver, PC*, No. 253568, 2005 WL 1968171, at *2 (Mich Ct App Aug 16, 2005) (same; citing *Arnold*); *Vandekerckhove v Scarfone*, No. 303130, 2012 WL 4840546, at *3 (Mich Ct App Oct 11, 2012) (same). These decisions are attached as Exhibit F to the Application.

apply it) in at least one published decision. *AFSCME Council 25*, 292 Mich App at 81. This well-settled agency principle is dispositive here, and should lead the Court to hold—indeed, peremptorily hold—that the individually-named defendants in Altobelli's complaint are entitled to invoke the arbitration provision in Miller Canfield's Operating Agreement.

The Miller Canfield Operating Agreement recognizes that the Firm only acts through its managers. It identifies the managing directors as having authority to "manage and administer the business and affairs" of Miller Canfield, Appx. 2, § 2.8; and it authorizes those managing directors to appoint the CEO and Group Leaders, *id.* §§ 2.13, 2.14. There is no dispute that Appellants are all properly-appointed agents of Miller Canfield; indeed, Altobelli himself specifically alleges that these individuals are empowered to make recommendations and decisions concerning how the firm is run, including relationships with other principals of the firm. *See, e.g.* First Amended Complaint ¶¶ 6-9 (identifying defendants as Miller Canfield's CEO, several managing directors, and the head of the Litigation Group) (Exhibit C to the Application); *id*. ¶¶ 137, 139. And Altobelli's claims relate to their alleged misuse of this authority to Altobelli's detriment – precisely as in *Arnold*. *See generally* First Amended Complaint. Altobelli's claim is, in effect, a claim against the Firm. *Cf. Dunmire v Schneider*, 481 F3d 465, 467 (CA7, 2007). His suggestion that the "Firm" can be entirely divorced from its principals, and that the principals may not invoke the arbitration clause, is untenable.

Moreover, the Operating Agreement's very structure reflects an understanding that traditional agency principles will apply the arbitration agreement to disputes involving principals who are undisputedly bound by the Agreement and thus also benefit from it.[2] Section 2.7(c)

[2] *See, e.g.*, *Shay v Aldrich*, 487 Mich 648, 675; 790 NW2d 629, 645 (2010) (recognizing that under "traditional contract principles" and Michigan statutory law, both direct beneficiaries and third-party beneficiaries of a contract are entitled to enforce its terms).

makes clear that a dispute against a principal *is* effectively a dispute against the firm, providing indemnification "from and against any and all losses, expenses, claims and demands sustained by reason of any acts or omissions or alleged acts or omissions as a Principal or Managing Director of the Firm . . ." Section 3.3 provides that the "covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto and their respective executors, administrators and assigns." *Id.* The arbitration clause, set forth at Section 3.6, is necessarily one of the "covenants and agreements" intended to "inure to the benefit" of the principals of the firm, including the Appellants. The Operating Agreement thus directly protects the Firm's principals, including its managers, by indemnifying them for their acts or omissions and providing for the benefit of arbitration. As Miller Canfield's agents, the individual defendants may rely upon the arbitration agreement in this dispute with Altobelli.

B. Altobelli Is Estopped From Avoiding Arbitration

While the agency principle should dispose of Altobelli's efforts to avoid arbitration, the distinct concept of estoppel binds him to the arbitration clause as well. It is well-established that if a party's tort claims are intertwined with the terms of a contract including an arbitration clause, he is estopped from claiming that the arbitration provision of that contract does not apply to him. *See generally* Michael J. Rosenhouse, Annotation, *Application of Equitable Estoppel by Nonsignatory to Compel Arbitration*, 39 A.L.R. Fed. 2d 17 (2009). Or, as Judge Easterbrook of the Seventh Circuit colorfully put it, "it would be unjust to allow a person who has agreed to arbitrate a dispute to weasel out of that promise by suing related persons or entities, so equitable estoppel blocks such a course." *Dunmire*, 481 F3d at 467.

Thus, courts have required arbitration where a contractor sued a construction manager for "tortiously interfering" with a construction contract that contained an arbitration clause; although

the claims sounded in tort, the allegations were essentially that the manager did not satisfy contractual obligations. *Hughes Masonry Co, Inc v Greater Clark Cnty Sch Bldg Corp*, 659 F2d 836, 838-41 (CA7, 1981). Likewise, the licensor of a trademark which had an arbitration agreement with the licensee could not avoid arbitration in a suit against the licensee's parent, where its claims – again, sounding in tort – essentially accused the parent of causing the licensing contract including the arbitration clause to be breached. *Sunkist Soft Drinks, Inc v Sunkist Growers, Inc*, 10 F3d 753, 757-58 (CA11, 1993). And shareholders of a corporation could rely on estoppel to invoke the arbitration provision of a contract between the corporation and the plaintiff, where "the shareholders [were] all officers and members of the Board of Directors" and thus controlled the corporation's activities. *Long v Silver*, 248 F3d 309, 320-21 (CA4, 2001). Again, there should be no doubt that the same traditional state-law estoppel principle applies in the arbitration context in Michigan. This Court said long ago that a party "cannot accept the benefits of a contract and, when called upon to perform its duties under it, repudiate it as made without right or as wanting in force." *Schnack v Applied Arts Corp*, 283 Mich 434, 440-41; 278 NW 117, 120 (1938).

Altobelli, by this lawsuit, is attempting precisely the same gambit these Courts have rejected. Rather than suing Miller Canfield for breach of the Operating Agreement, he has sued Miller Canfield's managing principals, refashioning claims for breach of contract into tort claims. These tort claims all fundamentally rest on the premise that the Appellants misused their positions at the firm to deprive Altobelli of the benefits that he believed he was entitled to as a Miller Canfield principal under the Operating Agreement. Indeed, Altobelli directly relies upon the Operating Agreement in support of his claims. As to his claim that he was underpaid, Altobelli asserted in his complaint that "Defendants disregarded the most fundamental provision

of the Operating Agreement providing that each principal is entitled to a share of the Firm's income proportionate to his or her relative contributions" and "disregarded a provision in the Operating Agreement requiring that bonus pool monies be reserved for attorneys not adequately paid in their base income allocation." First Amended Complaint ¶¶ 50-51 (Exhibit C to Application.)

Likewise, in his fiduciary duty claims, Altobelli says that the "Operating Agreement recognizes the fiduciary duty owed by the CEO and other Managers to each principal" and claims that Appellants violated that agreement by concluding that he had resigned from the firm. *Id.* ¶¶ 138, 152-159. And he complains that he was deprived of property "without due process required by law – the process required by the Operating Agreement." *Id.* ¶ 172.

The plaintiffs in *Hall v Stark Reagan, PC*, 493 Mich 903 (2012), argued that an arbitration clause dealt only with divesture of a shareholder's rights under the Shareholder Agreement, but not tort claims of discrimination which were grounded in the actors' intent. This Court disagreed:

> The dispute in this case concerns the motives of the defendant shareholders in invoking the separation provisions of the Shareholders' Agreement, Article 8.1 and/or Article 9.1, with respect to the plaintiffs. This is a "dispute regarding interpretation or enforcement of . . . the parties' rights or obligations" under the Shareholders' Agreement, and is therefore subject to binding arbitration pursuant to Article 14.1 of the Agreement.

Id. at 903. The same is true in this case, as Altobelli's claim attacking the motivation of Miller Canfield's managers necessarily requires "interpretation or enforcement" of the Operating Agreement.

There can thus be no question that Altobelli must be, and is relying on the Operating Agreement which contains the arbitration clause, for he asserts that Appellants have violated the Operating Agreement through their actions. Given that Altobelli seeks to hold Appellants liable

for denying him rights under the Operating Agreement—revealing that this case is, in effect, a lawsuit against Miller Canfield—equitable estoppel precludes him from escaping the Operating Agreement's arbitration clause.

III. CONCLUSION

Whether under agency or equitable estoppel principles, Miller Canfield's managing agents are entitled to the benefit of the Operating Agreement, including its arbitration clause. That aspect of the Court of Appeals' judgment should be reversed.

Respectfully submitted,

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Dated: December 28, 2015
241735

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 28, 2015, I electronically filed the foregoing **Supplemental Brief on Arbitrability** and this **Certificate of Service,** using the TruFiling system, which will send notification of such filing to Mark Granzotto, Dean Altobelli, and John Oostema.

/s/ Michelle Beveridge
Michelle Beveridge